TAN HEE WONG

v.

LEE TIAW CHONG

HIGH COURT MALAYA, SEREMBAN
MUSTAPHA HUSSEIN J
[ORIGINATING MOTION NO. 25-30 OF 1989]
20 APRIL 1990

LABOUR LAW: *Annual leave wages - Indemnity in lieu of notice - Termination benefits - Jurisdiction of Labour Office - Retrospective effect of amendment - Element of influence and partiality - Breach of natural justice - Section 69 Employment Act 1955.*

REVENUE LAW: *Income tax notification - Income Tax Act 1967, s. 83*

The respondent has been an employee of the appellant for about 30 years. On 5 October 1980 the appellant decided to close down his legal firm. An agreement was made whereby the appellant was to pay the respondent the sum of RM5,000. According to the appellant the money was in the nature of a compensation, provided that the respondent handed to him all accounts, files and books of the firm. The respondent said that the money was agreed termination benefits.

By 9 January 1989, the money had yet to be paid because, according to the appellant, the respondent had not handed to him the accounts, files and books which he required. On that date, the respondent filed his claim in the labour office, which proceeded to hold an enquiry into the matter. At the end of the enquiry, the labour officer found that there was a termination of service, not dismissal, and assessed RM13,031.16 being annual leave wage for 1988, indemnity in lieu of notice and termination benefits.

By 3 June 1989, the appellant had yet to receive his documents from the respondent. A police report had been lodged and a report was also made to the Bar Council. On 30 April 1989, the appellant closed down the firm.

Two matters were in issue before the Court, namely, the question of jurisdiction of the labour office to hold the enquiry and the propriety of the procedure adopted at the enquiry, which the appellant alleged involved elements of partiality and influence.

Held:

[1] The onus of proving that there was a termination of service lay on the respondent.

[2] The action of the respondent in asking for a 10-minute break in the middle of the enquiry to see an officer superior in rank to the officer conducting the enquiry constituted a breach of natural justice.

[3] Computation of termination benefits due to the respondent had not been done in accordance with reg. 6(1)(c) of the Employment (Termination and Layoff Benefits) Regulations 1980; it was also an error.

[Appeal allowed. Case remitted to Labour Department to be heard de novo.]

Case referred to:

Rajaretnam a/1 Palaniandy v. Amalgamated Properties & Industries [1988] 2 MLJ 363

Legislation referred to:
Employment Act 1955, s. 69
Employment (Termination and Layoff Benefits) Regulations 1980, reg. 6(1)(c)
Income Tax Act 1967, s. 83

For the appellant - Edmund Ponniah; M/s. Stanley Ponniah, Ng & Soo
For the respondent - in Person

JUDGMENT

Mustapha Hussain J:

This appeal arose out of the decision of the director-general of labour dated 10 June 1987 (Saman Pesuruhjaya Buruh C 1/89) ordering the appellant to pay RM13,031.16 being annual leave wages for 1988 indemnity in lieu of wage and termination benefits.

The appellant Tan Hee Wong was the senior lawyer in Seremban doing purely conveyancing work. The respondent was his only clerk running the office who started work running the office who started work as a typist on 1 December 1959 drawing a salary of RM120 per month and ending at RM608 per month.

It can safely be assumed that both the appellant who is a senior lawyer and the respondent who has been running the whole office for about 30 years, are conversant with the law at least the basics if not its intricacies and vagaries.

Some time on 5 October 1988 the appellant decided to close his legal firm and informed the respondent his man Friday. According to the appellant both he and the respondent agreed that appellant will pay RM5,000 to the respondent and the respondent will hand over to appellant all the accounts (especially clients' accounts) and files and books and they will part company and say goodbye.

According to the respondent he did not have those account books etc. and had handed over whatever there was.

On 25 November 1988 the Income Tax Notification under s. 83 of Income Tax Act was prepared by the respondent (as was his work being the only staff) and was signed by the appellant. In this form the expected date of cessation of employment of the respondent was typed as 31 December 1988 and also an endorsement of expected further payment to the respondent being

(a) RM608 salary for December payable on 1 December 1988; and

(b) termination benefits of RM5,000 payable on 2 January 1989.

The appellant had signed this Income Tax Notification but according to the appellant he did so on the belief and agreement that the respondent will hand over all the accounts books, files etc. to appellant and also that it was more of a compensation rather than termination benefits. The respondent had prepared this form. All these happened at the end of November 1988 (date on the form is 25 November 1988).

Respondent went on annual leave from 19 December 1988 to 31 December 1988. On 31 December 1988 he went to the office and found it locked (he was still in service on that day). He met the appellant on 3 January 1989 and said he handed the December account and asked for his termination benefits, indemnity in lieu of notice and balance of annual leave. According to the respondent, the appellant offered him RM5,000 as full and final settlement but respondent refused.

In his evidence, the respondent stressed to the fact that his service was terminated on 31 December 1989 (this is the date in the notes of evidence on p. 6 line 14 and not 31 December 1988) and relied on the Exhibit LTC3 the Income Tax Notification by the Employment ceasing to employ an individual under s. 83(3) of the Income Tax Act 1967.

On the other hand, the appellant in his evidence said that he had agreed to pay RM5,000 more of a compensation and not as termination benefits on condition that the respondent handed over all the documents. In his evidence he said he had not received in December 1988 and even on 3 January 1989 the account books which were necessary to inform his clients and return their moneys and as such he could not close his legal firm. On 3 January 1989 he still considered the respondent to be still in service. According to appellant on 3 January 1989 he refused to pay respondent the RM5,000 he had agreed because the respondent did not produce all the documents - that was the pre-condition for the appellant agreeing to pay RM5,000.

On 9 January 1989 the appellant issued a show cause letter to the respondent (Exhibit D2). In the mean time the respondent had filed a claim in labour office on 6 January 1989 which was unknown to the appellant who came to know of the labour office case only on 3 February 1989.

At the end of the enquiry, the labour officer on 10 June 1989 found that there was a termination of service and not dismissal and assessed the RM13,031.16 being annual leave wage for 1988, indemnity in lieu of notice and termination benefits.

The appellant at the date of the enquiry that is 3 June 1989 still had not received the documents but he had made police report and also reported to the bar council *vis-a-vis* his clients' accounts, whereupon he eventually closed his office on 30 April 1989.

Two questions of law were forwarded by the appellant in his appeal.

First, on the question of jurisdiction of the labour office to hold the enquiry under s. 69 of the Employment Act 1955. The appellant had raised this point as a preliminary objection saying that the amendment to s. 69 was not retrospective and that the director-general of labour has no power to enquire if it is a dismissal as opposed to termination of service. The complaint by the respondent was filed in the labour office on **6 January 1989**. The amendment to s. 69 of the Employment Act came into force on **10 February 1989**. Unless there is provision of retrospective effect, the labour officer did not have the jurisdiction to adjudicate on the validity of a dismissal before 10 February 1989. Authority can be found in the Supreme Court case of *Rajaretnam a/1 Palaniandy v. Amalgamated Properties & Industries* [1988] 2 MLJ 363.

However, the labour officer continued with the enquiry to find out whether it was a termination or dismissal, and came to the conclusion that it was a termination purely based on the Income Tax Notification form.

However, during the enquiry whilst under cross-examination, the respondent asked permission to adjourn the enquiry for about ten minutes to cross over to enter the room of the superior officer of the enquiry presiding officer and returned to continue with the cross-examination. This is very strange, as if telling enquiry presiding officer that he had gone to see his superior and he better watch out. Why should the complainant (respondent) seek permission in the midst of a cross-examination to see the superior of the enquiry officer. Had this influenced the labour officer holding the enquiry? It is simply improper. It gives rise to suspicion that there is some element of influence and or partiality. It contravenes the rule of natural justice.

Much reliance was placed by the enquiry officer on the LTC 3 the Income Tax Notification. It must be remembered this was prepared by the respondent who is not ignorant of the law he being the office managing clerk of the appellant's legal firm. The enquiry officer did not consider this background. There was no evidence that the appellant was telling a lie when he said he was not aware that there was a complaint filed by the respondent when he issued the show cause letter on 9 January 1989, which means that on 9 January 1989 the respondent was still in service and working.

The onus of proving termination is on the respondent and apart from the self-serving peremptien Income Tax Form (LTC3) there is no iota of evidence that there was termination of service. There was no consideration at all by the enquiry officer on the explanation by the appellant as to why he signed the LTC3.

On the ground of breach of natural justice, the respondent in the middle of the enquiry asking for ten minutes to see a higher officer than the officer conducting the enquiry, it is also a ground to allow the appeal and to remit the case back to the Labour Department for another officer to hold enquiry and find if it was a termination and not dismissal

On the lack of evidence that the enquiry officer said appellant had not proved, first it is not the onus on the appellant to prove anything but it is for the respondent to prove termination; and secondly the police report, report to the Bar Council and search by Mr. Atma Singh Gill, throw some light that the documents are still not available.

The appeal is therefore allowed.

In the circumstances of this case, I order that this case to be remitted back to the labour department to be heard *De Novo* by another labour officer to determine on the fact whether this is a dismissal or termination.

No order as to costs.

Also found at [1990] 2 CLJ 1057